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No. 84-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ATASCADERO STATE HOSPITAL and CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
Petitioners,
vs.

DOUGLAS JAMES SCANLON,
Respondent.

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

1. Does the doctrine of sovereign immunity as exemplified by the Eleventh Amendment to the United States Constitution bar private actions in federal courts under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) against States and their agencies?

PARTIES TO THE PROCEEDINGS

Petitioners Atascadero State Hospital and California Department of Mental Health are administrative entities under the aegis of the State of California and are defendants in the action below. Respondent is Douglas James Scanlon, an applicant for employment with petitioners and the plaintiff in this case.

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit, filed on June 13, 1984, is reported at 735 F.2d 359 and is reprinted at pages A-1 through A-5 of the Appendix to the Petition for Writ of

Certiorari (hereinafter, "Petition"). Prior to that decision, on grounds not related to the question presented herein, this Court on March 19, 1984 granted a petition for writ of certiorari by respondent Scanlon, vacating a prior decision of the Court of Appeals (677 F.2d 1271 (9th Cir. 1982)) and remanding the matter for reconsideration by the appellate tribunal. ____U.S.____, 104 S.Ct. 1583. That Order is reproduced at page A-6 of the Petition. The Court of Appeals' prior Opinion, filed May 24, 1982, is reproduced at pages A-7 through A-21 of the Petition.

The initial Opinion and Order of the United States District Court for the Central District of California dismissing respondent's complaint was

not reported but is set forth at pages A-22 through A-24 of the Petition.

JURISDICTION

The Opinion of the Court of Appeals was entered on June 13, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Petition herein was filed on August 31, 1984 and was granted on November 26, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XI:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

29 U.S.C. § 794, Pub. L. 93-112, Title V, § 504, September 26, 1973, 87 Stat. 394, as amended Pub. L. 95-602, Title I, §§ 119, 122(d)(2), November 6, 1978, 92 Stat. 2982, 2987:

"Nondiscrimination under federal grants and programs; promulgation of rules and regulations

"No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrim-

ination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such

regulation is so submitted to such committees."

29 U.S.C. § 794a, Pub. L. 93-112, Title V, § 505, as added Pub. L. 95-602, Title I, § 120, November 6, 1978, 92 Stat. 2982:

"Remedies and attorney fees

"(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-16], including the application of sections 706(f) through 706(k) [42 U.S.C.A. § 2000e-5(f) through (k)], shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or

by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accomodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

"(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal

provider of such assistance under section 794 of this title.

"(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

42 U.S.C. § 2000d, Pub. L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252:

"Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

The decision of the Court of Appeals holds that States and their agencies may be sued by private parties in Federal district courts in actions brought pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), notwithstanding the Eleventh Amendment to the United States Constitution and the doctrine of sovereign immunity

embodied therein. The Circuit Court reached this conclusion based solely upon a review of the Rehabilitation Act and the panel's analysis of case law precedent.

Because the proceedings in the District Court terminated by reason of a Motion to Dismiss at the pleading stage, the record is necessarily limited. This action was commenced on November 21, 1979 by respondent Douglas James Scanlon, who alleged that petitioner Atascadero State Hospital (administered by petitioner California Department of Mental Health) in 1978 refused to employ him as a graduate student assistant-recreation therapist solely because of his physical handicap, i.e. diabetes mellitus and lack of vision in one eye. (Joint Appendix, hereinafter

"J.A.," pp. 8-11, ¶¶ 6-11.) Respondent further alleged that State petitioners were recipients of federal financial assistance (J.A., pp. 6-7, ¶¶ 4-5), and that their action violated section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and State fair employment laws. (J.A., pp. 18-21, ¶¶ 26, 30, 34.) Compensatory, injunctive and declaratory relief were sought. (J.A., pp.21-23.)

Petitioners responded to the complaint by moving to dismiss the action on two grounds: (1) that petitioners were immune from suit in federal court in private actions under section 504 by reason of Eleventh Amendment immunity; and (2) that respondent had failed to allege an essential element for a claim under section 504, to wit, that the federal

assistance allegedly received by petitioners was for the primary purpose of providing employment. (J.A., pp. 47-50.)

The District Court granted petitioners' motion and ordered the action dismissed, holding that the State agencies indeed were protected by the Eleventh Amendment grant of immunity. The court rejected petitioners' second grounds for dismissal. (Petn., pp. A-22 through A-24.)

The Court of Appeals for the Ninth Circuit, on the other hand, accepted the premise of the aforementioned second grounds and affirmed dismissal on that basis, never reaching the sovereign immunity question. (677 F.2d 1271 (1982); Petn. pp. A-7 through A-21.)

In November 1982, respondent

petitioned this Court for a writ of certiorari, presenting, in essence, the question of whether, in order for a qualified handicapped person to state a viable claim under section 504, the federal financial assistance alleged to have been received by an employer must have been for the primary purpose of providing employment. (U.S. Sup. Ct. Dock. No. 82-5812.)

This same question was presented in a related case, Consolidated Rail Corp. v. Darrone (sub. nom.: Le Strange v. Consolidated Rail Corp.), which this Court subsequently accepted for review. (U.S. Sup. Ct. Dock. No. 82-862.) On February 28, 1984 the Court issued its Opinion in Consolidated Rail Corp., holding that an employer could be sued under section 504 regardless of the

purpose of the federal financial assistance it had received. (___U.S.___, 104 S.Ct. 1248.)

Consequently, on March 19, 1984 this Court granted respondent's petition for writ of certiorari, vacated the Court of Appeals decision and remanded the matter for further consideration in light of the Consolidated Rail Corp. opinion. (___U.S.___, 104 S.Ct. 1583; Petn., p. A-6.)

On remand, the Court of Appeals for the Ninth Circuit noted the Consolidated Rail Corp. decision and found it to be controlling with respect to the issue it had initially determined on appeal in this action. The court then proceeded to address the sovereign immunity question previously not decided on appeal. In an Opinion by the Honorable

Ben C. Duniway, in which the Honorable Warren J. Ferguson and the Honorable Richard B. Kellam (United States District Judge for the Eastern District of Virginia sitting by designation) concurred, the court reversed the District Court and remanded the matter for further proceedings. The court concluded that the Rehabilitation Act of 1973 literally included States as potential defendants in private actions brought by individuals and that petitioners, by allegedly receiving federal funds under said Act, had consented to be sued thereunder. (735 F.2d 359 (1984); Petn., p. A-1.) On August 31, 1984 State petitioners filed their Petition for Writ of Certiorari, which was granted on November 26, 1984. (__U.S.__, 105 S.Ct. 503.)

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals committed error in concluding that Congress abrogated States' sovereign immunity as to private actions brought in federal courts pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), and in holding that State petitioners implicitly consented to be sued thereunder by virtue of their participation in and receipt of federal financial assistance under the Act.

The traditional doctrine of sovereign immunity, as constitutionally exemplified in the Eleventh Amendment, has been acknowledged and safeguarded in the decisions of this Court throughout the past century. Pursuant to those decisions the rule has emerged, and has been consistently applied, that States'

immunity to private suit in federal courts will not be declared annulled absent express Congressional intent in the legislation in question and clear evidence that a State has consented to or waived its immunity respecting such actions. (Section I A, infra.)

The adherence to this rule is dictated and justified by traditional concepts of federalism and permits predictability and informed decision-making by all three branches of federal and state governments. Particularly in the context of legislation enacted pursuant to the Spending Clause, the requirements of express abrogation and consent allow States and their agencies to know at the outset that their acceptance of federal assistance, for instance, under a given program may

constitute a waiver of their constitutional immunity. (Section I A, infra.)

The Rehabilitation Act represents typical Spending Clause legislation. (Section I C, infra.) Section 504 (29 U.S.C. § 794) prohibits discrimination against handicapped individuals in any program or activity conducted by a recipient of federal assistance. Section 505(a)(2) (29 U.S.C. § 794a (a)(2)) accords aggrieved individuals the remedies, procedures and rights of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.). Neither Title VI nor the Rehabilitation Act makes any mention of an express private right of action to sue States or their agencies in federal courts. Nor is there any language or scheme elsewhere

in the Act which implies, let alone compels, that States have surrendered or have been divested of their sovereign immunity. (Section I B, infra.)

A conclusion that the Act represents a Congressional effort at overriding the immunity granted States by the Eleventh Amendment runs counter to this Court's decisions, even if one accepts the argument that Congress' source of power at issue here is the enforcement clause of the Fourteenth Amendment. Not only is the Act itself silent with respect to an attempted abrogation of sovereign immunity, its legislative history is indicative of a contrary Congressional understanding. (Section I D, infra.)

Congress knows how and indeed in other circumstances has explicitly expressed in statutory language its

intent to abolish States' immunity. If it intends to condition the grant of financial assistance upon States' waiver of their constitutional immunity, it should not be left to the Judicial and Executive branches or State recipients to divine whether such an intent exists and whether a waiver has or will attach. (Pennhurst I, infra, 451 U.S. 1, 17-18 (1981).) (Section II, infra.)

The Ninth Circuit's analysis and treatment of this Court's decisions on both abrogation and consent (waiver) are erroneous, particularly as applied to the Rehabilitation Act, and its decision below should be reversed.

ARGUMENT

I

THE DOCTRINE OF SOVEREIGN IMMUNITY AS EXEMPLIFIED BY THE ELEVENTH AMENDMENT BARS PRIVATE ACTIONS AGAINST STATES AND THEIR AGENCIES BROUGHT IN FEDERAL DISTRICT COURTS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

A. This Court's Prior Decisions on the Eleventh Amendment Require Express Statutory Abrogation by Congress

1. Introduction

The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The principle embodied in the

Amendment gives constitutional[1] status to the doctrine of sovereign immunity, a concept reaffirmed last term in Pennhurst State School & Hosp. v. Halderman, ____U.S.____, 104 S.Ct. 900, 907 (1984) (hereinafter, "Pennhurst II"):

> "'That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by

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1/ See, also, Edelman v. Jordan, 415 U.S. 651, 666 (1974): " . . . [T]he important constitutional principle embodied in the Eleventh Amendment."

private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens,[2] because of the fundamental rule of which the Amendment is but an exemplification.'" (Quoting from Ex Parte State of New York No. 1, 256 U.S. 490, 497. (1921).) (Footnote added.)

The passage quoted above from the

2/ For nearly a century, since its decision in Hans v. Louisiana, 134 U.S. 1 (1890), the Court has adhered to the tenet that, notwithstanding the literal language of the Eleventh Amendment, suits against States brought by their own citizens are encompassed within the Amendment's proscription.

Pennhurst II opinion represents but the latest instance of the Court verifying the strength and scope of the absolute bar posed by the Eleventh Amendment. This principle was previously enunciated in Employees v. Missouri Public Health Dept., 411 U.S. 279, 284 (1973):

> "The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State."

The bar of sovereign immunity applies, as to States and State agencies, irrespective of the nature of the relief sought, whether in law or in equity. Pennhurst II, supra, 104 S.Ct. at p. 908; Cory v. White, 457 U.S. 85, 90-91 (1982).

The issue presented in the instant case is whether, under any of the principles or tests employed by this Court in its prior analyses of the Eleventh Amendment's breadth, private Federal court actions under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794; hereinafter, "Act")[3] avoid

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3/ The Act and its various provisions are discussed more fully in section B, infra, of this brief. The crucial portions for this part of the argument, however, are:

29 U.S.C. § 794, which provides:

"No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . . "

and

29 U.S.C. § 794a(a)(2), which reads:

"The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] shall be available to any person aggrieved by any act or

(continued)

the bar of immunity.

In its brief opinion the Court of Appeals gave little more than passing acknowledgment to the status accorded States' sovereign immunity, except to declare it swept away by a statutory scheme which contains no hint of a Congressional effort at lifting that immunity. Notwithstanding the doctrine's constitutional stature and the deference accorded it in recent decisions of this Court, the Ninth Circuit found it a remarkably facile task to introduce the State of California to a federal forum for lawsuits brought by the handicapped under section 504.

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failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."

It is not the position of these State petitioners that handicapped individuals should not have or do not have available to them civil remedies to correct discriminatory practices.[4] Suit in state court under section 504 looms as the most obvious. Adjudication of federal claims in a state forum is not uncommon and whatever policy reasons may

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4/ State petitioners have not asserted that an implied private right of action does not exist as to a § 504 claim. There is virtual unanimity in the Circuit Courts that such a remedy exists and all indications from this Court suggest that conclusion. See, Consolidated Rail Corp. v. Darrone, ___U.S.___, 104 S.Ct. 1248, 1252 (1984); Southeastern Community College v. Davis, 442 U.S. 397 (1979). See, also, Guardians Ass'n v. Civ. Serv. Com'n. of City of N.Y., ___U.S.___, 104 S.Ct. 3221 (1983) (implied right of action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.) and Cannon v. University of Chicago, 441 U.S. 677 (1979) (implied right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681).

be offered against such practice, they do not override the constitutional limitation on the authority of the federal judiciary to entertain suits against States. (Pennhurst II, supra, 104 S.Ct. at pp. 919-920.)

Furthermore, respondent elected not to name as defendants below any state officials, thereby forfeiting the opportunity, at least, of arguing that district court jurisdiction attached under the rule of Ex Parte Young, 209 U.S. 123 (1908). See, e.g., Quern v. Jordan, 440 U.S. 332, 345 (1979).[5]

5/ Whether suit had been instituted under § 504 in state court or against state officials in district court, the extent of available remedies would still need to be addressed in such actions. Although this Court in Consolidated Rail Corp. v. Darrone, supra, 104 S.Ct. at pp. 1252-1253, authorized compensatory backpay under § 505(a)(2) for intentional discrimination, it did not do so (continued)

Moreover, California law provides independent State remedies for handicapped individuals who allege discriminatory employment practices.[6]

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in the context of a suit against State defendants. Plaintiffs bringing § 504 actions against a State or its officials may well be limited to injunctive and declaratory relief. (Cf., Pennhurst State School v. Halderman, 451 U.S. 1, 29-30 (1981) (hereinafter "Pennhurst I"); Guardians Ass'n. v. Civ. Serv. Com'n. of City of N.Y., supra, 103 S.Ct. 3221, 3234-3235 (1983); Rosado v. Wyman, 397 U.S. 397, 420-421 (1970). But, compare, Smith v. Robinson, ___U.S.___, 104 S.Ct. 3457, 3473, n. 24 (1984).

6/ California Government Code § 12900 et seq. ["California Fair Employment and Housing Act"], and, in particular, § 12926(c), which identifies the State and its agencies as covered employers under that Act, § 12940, which prohibits job discrimination against the physically handicapped, and § 12965(b), which provides for a private civil action in state court. It has been commented that this State remedy is actually superior to that offered by Federal statutes. (See, Gelb and Frankfurt, California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination, 34 Hast. L.J. 1055, 1090-1105 (March-July 1983).)

Respondent, however, chose to frame his remedy as a section 504 claim against two State entities[7] in federal district court, thus bringing to full issue the sovereign immunity defense and the essential concern of these State petitioners:

> "A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Pennhurst II, supra, 104 S.Ct. at p. 907.

2. Necessary Conditions for Abrogation or Waiver of Immunity

7/ Petitioner Atascadero State Hospital is operated by petitioner California Department of Mental Health for the care, treatment and education of the mentally disordered. (California Welfare and Institutions Code § 7200.)

When this Court's decisions respecting the Eleventh Amendment are analyzed, it is clear that in the context of section 504 there has been no abrogation of sovereign immunity by Congress, nor has there been any waiver of such immunity by these petitioners. At the same time, petitioners respectfully submit that it becomes manifest that in reaching the conclusion that it did, the Ninth Circuit panel erred both in their analysis and application of those decisions, and in their unsupported conclusion that section 504 is an enactment pursuant to the enforcement clause of the Fourteenth Amendment.

Because there is a sharp dispute between the parties as to what is the appropriate test to be applied in

Eleventh Amendment cases, petitioners believe it is beneficial to review in some depth the relevant sovereign immunity cases in order to establish what is the appropriate test.

While both the principle of sovereign immunity as exemplified by the Eleventh Amendment and the relevant decisions applying that principle have been the subject of much comment and suggestion-making by critics,[8] the Court's recognition and protection of the doctrine have endured. Indeed, the most recent decisions of this Court reaffirm the doctrine's vitality and serve to polish its shield.

The Court has recognized that a

8/ Indeed, as early as 1924 it was suggested that governmental immunity be abolished. Borchard, Governmental Responsibility in Tort, 34 Yale L.J. 1.

State's immunity can be relinquished by its consent to abrogation or, in limited circumstances, through abrogation by Congress. Under both of these exceptions, the Court's rulings have been unequivocal and consistent in requiring a clear statement in the relevant statutory scheme[9] that "Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court." Employees v. Missouri Public Health Dept., supra, 411 U.S. at p. 283.

Consequently, whether an examination of petitioners' immunity vis-a-vis the Rehabilitation Act focuses upon consent (waiver) or abrogation, one finds

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9/ The sole asserted aberration to this requirement is found in Hutto v. Finney, 437 U.S. 678 (1978), discussed below.

that the determining factor is invariably the clarity of Congressional intent to subject States to suit in federal court.

Thus, in Edelman v. Jordan, 415 U.S. 651 (1974), we find the clearest statement of the rule, which still pertains today, for testing claims of consent or constructive waiver. In that case, the Court of Appeals affirmed an award of retroactive relief against State officials based upon their noncompliance with federal requirements under the federal-state aid program known as Aid to the Aged, Blind, or Disabled ("AABD").

In anticipation that its award might run afoul of an Eleventh Amendment objection, the Court of Appeals additionally ruled that the State had

waived its immunity by participating in the AABD program.[10] It was because of this latter holding that this Court in Edelman found it necessary to announce the following test:

> "The question of waiver or consent under the Eleventh Amendment was found in those cases[11] to turn on whether Congress had intended to abrogate the immunity in question, and

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10/ 415 U.S. at p. 671

11/ Employees v. Missouri Public Health Dept., supra; Parden v. Terminal R. Co., 377 U.S. 184 (1964); Petty v. Tennessee-Missouri Com'n., 359 U.S. 275 (1959). Because these latter two cases antedate the Edelman decision and because their holdings, for the most part, have been eviscerated (see Edelman, supra, 415 U.S. at p. 672; Employees, supra, 411 U.S. at pp. 279-285), no separate discussion of them is contained in this brief. Petitioners did include a detailed treatment of them in their Petition herein. (Petn., pp. 15-20.)

whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity." (Footnote added.) Id., 415 U.S. at p. 672.

Edelman, therefore, resolved that when a State's immunity is challenged, a two-part test is to be applied: (1) abrogation and (2) consent (waiver). The Edelman decision has further significance in that it proceeded to define the requisites of this dual inquiry.

As to the abrogation part of the test, a court must first ascertain "the threshold fact of congressional authorization to sue a class of defendants which literally includes

States. . . . " Id., 415 U.S. at p. 672. (Emphasis added.)

On the consent or waiver side of the test, the Court observed:

> "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" (Quoting from Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).) Id., 415 U.S. at p. 673.

The Edelman decision then proceeded to apply these standards to the legislation in question and concluded that

there was no evidence of intended abrogation, nor was mere participation in a federal assistance program sufficient to constitute consent.[12] Id., 415 U.S. at pp. 673-674.

The cases subsequent to Edelman have adhered to and fortified the requirement that before abrogation of immunity will be declared to have been effected, there first must be found a clear and expressed intent by Congress that it indeed considered the question and intended to subject States to suit in federal court.

In the proceedings below, respondent has argued that the Edelman holding has

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12/ Given the test set forth by Edelman, a court today, presented with the same facts and circumstances, would not even reach the issue of consent or waiver, once it had failed to find an explicit abrogation.

been attenuated by two other decisions of this Court. The first of these, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), actually cited with approval and applied the rule of Edelman, terming it the "necessary predicate." Id., 427 U.S. at pp. 451-452.

The legislation under examination in Fitzpatrick was Title VII of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 253, 42 U.S.C. § 2000e et seq. In 1972, provisions of Title VII were amended, whereby former express exclusions of States and State agencies as "employers" and of State civil service personnel as "employees" were struck, and replaced by express inclusion of both under the Title's coverage. Id., 427 U.S. at p. 449, n. 2. (See, 42 U.S.C. § 2000e (a), (f).)

In addition, employees aggrieved under Title VII were explicitly conferred a private civil remedy (42 U.S.C. § 2000e-5(f)(1)), and Congress provided for an express grant of jurisdiction to federal district courts as to such actions. (42 U.S.C. § 2000e-5(f)(3).)

In the light of these statutory provisions, therefore, the Court in Fitzpatrick had little difficulty in finding the "necessary predicate" of Edelman -- the "threshold fact of congressional authorization to sue the State as employer" -- clearly present. Id., 427 U.S. at p. 452.

The remainder of the opinion in Fitzpatrick involved the Court's concern with the potential impact on the doctrines of federalism and sovereign

immunity that was posed by the imposition of Title VII obligations upon the States. Satisfied that the Eleventh Amendment is limited by the enforcement provisions of section 5 of the Fourteenth Amendment, the Court concluded:

> "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." (Footnote and citations omitted; emphasis added.) Id., 427 U.S. at p. 456.

In sum, the decision in Fitzpatrick

reaffirmed the Edelman requirement of a clear Congressional statement regarding the threshold fact of abrogation. It further established that Congress retains the power under the Fourteenth Amendment to effect an abrogation, notwithstanding the Eleventh Amendment, provided that it clearly expresses its intent to subject States to suit in federal court.[13]

13/ This latter holding of Fitzpatrick has been interpreted as having erased the necessity for the second part of the Edelman test, i.e. States' consent to suit, when Fourteenth Amendment legislation is at issue. Baker, Federalism and the Eleventh Amendment, 48 U. Colo. L.R. 139, 171 (1977); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suits Upon the States, 126 U.Pa. L.Rev. 1203, 1235-1236 (hereinafter, Field). Of course, the presence of consent or implied waiver becomes irrelevant, anyway, if the subject legislation fails the threshold question on express abrogation. See, note 12, supra.

Hutto v. Finney, 437 U.S. 678 (1978) is another case which is often mischaracterized and which has been relied upon by respondent. In holding that attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976[14] could be awarded against States despite the Eleventh Amendment, the Court's attention was focused on the nature of the relief, rather than adherence to any test that might apply in the case of substantive relief. Thus in response to the State's argument that Congressional abrogation of sovereign immunity must be found in express statutory language, the Court distinguished Edelman and Employees as follows:

"But these cases concern

14/ Pub.L. 94-559, 90 Stat. 2641, 42 U.S.C. § 1988.

retroactive liability for prelitigation conduct rather than expenses incurred in litigation seeking only prospective relief.

"The Act imposes attorney's fees 'as part of the costs.' Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity." (Emphasis added.) Id., 437 U.S. at p. 695.

The statutory fee provisions examined in Hutto did not expressly include States as liable parties, although the Court found such intended inclusion clear from both legislative history and Congressional comments.

Based upon dicta in a footnote of the

opinion[15], respondent and others have offered the Hutto decision as authority for the proposition that the search for the threshold fact of Congressional authority to sue States is not limited to language in the statute itself. They assert that abrogation may be found through a review of relevant legislative history when the statute is a Fourteenth Amendment enactment.

Such a reading of the Hutto opinion, however, ignores the essential holding of the case and its focus on the fact that "costs" were the stake. This interpretation also overlooks the majority opinion's own distinction of

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15/ "Applying the standard appropriate in a case brought to enforce the Fourteenth Amendment, we have no doubt that the Act is clear enough to authorize the award of attorney's fees payable by the State." Id., 437 U.S. at pp. 698-699, n. 31.

holding:

> "But an award of costs . . . could hardly create any such hardship for a State. Thus we do not suggest that our analysis would be the same if Congress were to expand the concept of costs beyond the traditional category of litigation expenses." Id., 437 U.S. at p. 697, n. 27.

Consequently, State petitioners submit that Hutto has no application to claimed Congressional efforts at abrogation which here would impose substantive liability on the merits against States and goes beyond traditional concepts of litigation costs.[16]

16/ In fact, it is questionable whether the Hutto decision would have been the (continued)

This view comports with that stated in Quern v. Jordan, supra, 440 U.S. at p. 344, n. 16:

"While Hutto, unlike Fitzpatrick and Employees, did not require an express statutory waiver of the State's immunity . . ., the Court was careful to emphasize that it was concerned only with expenses incurred in

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same at all had the Court had the counsel of its subsequent holdings in Quern v. Jordan, 440 U.S. 332 (1979) and Alabama v. Pugh, 438 U.S. 781 (1978). One of the more influential reasons which led the Hutto court to its conclusion that the Act was "clear enough" (see, note 15, supra) was the fact that "indeed, the Act primarily applies to laws passed specifically to restrain state action." Id., 437 U.S. at p. 694. Yet, one of those very "laws" referenced by the Act, and the law which underlay the lower court's fee award in Hutto, i.e. 42 U.S.C. § 1983, was found not to apply to States in both the Quern and Alabama cases. This dichotomy was the precise concern expressed by Justice Powell in his dissenting opinion in Hutto. Id., 437 U.S. at p. 704, et seq.

litigation seeking prospective relief while the other cases involved retroactive liability for prelitigation conduct." (Emphasis added.)

The Court in Quern concerned itself with determining whether § 1983 (a Fourteenth Amendment enactment) effectuated an abrogation of sovereign immunity. The Court cited with approval those portions of the decisions in Fitzpatrick and Employees which had adhered to the standard of express statutory abrogation. Id., 440 U.S. at pp. 343-344. With respect to § 1983, the Court found the statute's general language ("every person") insufficient to constitute "an intent to sweep away the immunity of the States." Id., 440 U.S. at p. 345. In also finding the

statute's legislative history wanting, the Court expressly noted, that by expanding its inquiry beyond the statutory language, it was not deciding that such an examination was necessary. Id., 440 U.S. at pp. 344-345, n. 16.

Lastly, in Pennhurst II, supra, 104 S.Ct. at p. 907, the Court once again reaffirmed that, irrespective of the source of Congress' power, its legislation must first evidence express abrogation:

> "Similarly, although Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, see Fitzpatrick v. Bitker [sic], 427 U.S. 445, 96 S.Ct. 2666, 49

L.Ed.2d 614 (1976), we have required an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" (Quoting from Quern v. Jordan, supra, 440 U.S. at p. 342.) (Inserts and emphasis added.)

As demonstrated below, when the principles elucidated in Edelman and its progeny are applied to the instant case, it is apparent that the provisions of the Act fall far short of evidencing either abrogation or consent.

B. The Rehabilitation Act of 1973 and, In Particular, Section 504, Do Not Reflect Any Evidence of Congressional Intent to Abrogate States' Immunity

The Rehabilitation Act of 1973, Pub.L. 93-112, 87 Stat. 357, 29 U.S.C. § 701 et seq., enacted in succession to the Vocational Rehabilitation Act (former 29 U.S.C. §§ 31-42), continued in force one of the nation's oldest grant-in-aid programs.[17] The Act is a comprehensive federal program aimed at improving the lot of the handicapped. Consolidated Rail Corp. v. Darrone, supra, 104 S.Ct. at p. 1250.

The Act is divided into six subchapters which, in turn, state the purposes of the legislation. For example, subchapter I, § 720(a) (Vocational Rehabilitation Services)

17/ A thorough review of the rehabilitation program in the United States is set forth in S.Rep. No. 93-318, 93rd Cong., 1st Sess. 2, reprinted in [1973] U.S. Code Cong. & Ad. News 2076.

provides that its purpose is to authorize grants to assist States to meet the needs of handicapped individuals to prepare for and engage in gainful employment. To similar effect are: subchapter III, § 770(2) (authorize grants to assist in the provision of vocational training) and § 773(a) (assist and encourage the provision of rehabilitation facilities); and subchapter VII, § 796 (authorize grants to assist States in the provision of comprehensive services for independent living).

These declarations of purpose make it clear that the Act is a typical federal spending program. See, Pennhurst I, supra, 451 U.S. at p. 18 (discussing the Developmentally Disabled Assistance and Bill of Rights Act of 1975, as added,

Pub.L. 94-103, 89 Stat. 496, as amended, 42 U.S.C. § 6000 et seq.)

Other salient elements of the Rehabilitation Act provide for the submission and approval of State plans (29 U.S.C. § 721) and the sanction of a federal funding cutoff for non-compliance therewith. (29 U.S.C. § 721(c)(1).) Another significant provision is found at section 775(e) of the Act, wherein it is specified that grantees under that subchapter, whether a public or private agency, may be sued by the federal government in loan recovery actions brought in federal district courts. Also, section 792(d) provides for federal court jurisdiction in architectural barrier cases.

When Congress turned to creating a remedy for handicapped individuals

against recipients under the Act, it did not even provide for an explicit private cause of action, let alone express an intent to abrogate States' sovereign immunity. Rather, the remedies, rights and procedures set forth in Title VI[18] of the Civil Rights Act of 1964 (Pub.L. 88-352, 78 Stat. 252, 42 U.S.C. § 2000d et seq.) are incorporated and accorded persons aggrieved by section 504 recipients. (29 U.S.C. § 794a(a)(2).)

The Act simply contains no language which addresses or even infers an abrogation of immunity. The opinion below conceded this point (Petn., p. A-3), as did the only other Circuit

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18/ Title VI, of course, is equally silent with respect to the provision of a private cause of action. Nor does it contain any language expressing any effort or intent to subject States to suit in federal courts.

decisions which have considered the issue.[19] Instead, the Ninth Circuit focused on the observation that the Rehabilitation Act "contains extensive provisions under which states are the express intended recipients of federal assistance." (Petn., p. A-3.)[20]

19/ Ciampa v. Massachusetts Rehabilitation Com'n., 718 F.2d 1, 3 (1st Cir. 1983) and Miener v. State of Mo., 673 F.2d 969 (8th Cir. 1982), cert. den, 459 U.S. 909 (1982), both of which upheld the defense of sovereign immunity.

20/ The opinion also noted that an implementing regulation (45 C.F.R. § 84.3(f)) broadly defines recipients to include States. (Petn., p. A-3.) Neither this nor any other relevant regulation, however, in any way addresses suits in federal courts or States' immunity. The regulations do concern a number of issues and procedures under the Act, including governmental sanctions, wherein the inclusion of States as "recipients" is germane. (See, e.g., 45 C.F.R. § 84.6.) To infer that 45 C.F.R. § 84.3(f) lends support to a finding that sovereign immunity has been abrogated is to deem those regulations (continued)

It is not enough that States may be thoroughly enmeshed in the statutory scheme, or even explicitly mentioned as subject to various of the legislative provisions and conditions. Rather, the initial part of the test seeks to ascertain "the threshold fact of congressional authorization to sue a class of defendants which literally includes States." (Emphases added.) Edelman v. Jordan, supra, 415 U.S. at p. 672. Accord, Employees v. Missouri

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far more pervasive weight than even the promulgating federal agency would accord them. In paragraph 8, subpart A, of Appendix A to 45 C.F.R. Part 84, "Analysis of Final Regulation," it is stated: "Private rights of action . . . To confer such a [private] right [of action] is beyond the authority of the executive branch of Government." (Inserts added.) To confer or imply by regulation a right to sue States in federal courts, notwithstanding sovereign immunity, would constitute an even greater ultra vires effort by the Executive branch.

Public Health Dept., supra, 411 U.S. at p. 285.

The Rehabilitation Act presents language and circumstances even less compelling than those that were unsuccessfully examined in the Employees case. There, the argument was made that Congress had lifted States' immunity under the Fair Labor Standards Act ("FLSA") of 1938, June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C. § 201 et seq. Even though the Court found that State employers were indeed literally covered under the FLSA and that a private remedy was expressly provided, the bar of the Eleventh Amendment was upheld.

What was found lacking by the Court in Employees was any indication by clear language that Congress intended to subject States to suit in federal courts

notwithstanding the Eleventh Amendment. 411 U.S. at p. 285.

As mentioned above, the Rehabilitation Act does not even explicitly refer to a private remedy, let alone authorize jurisdiction in all courts.

Congress knows how to clearly express its intent to abrogate sovereign immunity and it will not be presumed to have done so silently. Id., 411 U.S. at pp. 284-285. When it added section 794a to the Act in 1978, it presumably was aware of the Court's decisions and the standards announced in Fitzpatrick, Edelman and Employees.[21]

In fact, in the very next year after

21/ "It is always appropriate to assume that our elected representatives, like other citizens, know the law [including court precedents] . . . . " (Insert added.) Cannon v. University of Chicago, 441 U.S. 677, 696-697, 699 (1979).

the Employees decision Congress amended § 216(b) of the FLSA. As contrasted with the statutory language found insufficient by the Court to constitute an abrogation of immunity, i.e. "[a]ction to recover such liability may be maintained in any court of competent jurisdiction," the section was amended to read:

> "Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State Court . . . ." (Emphases added.) (Pub.L. 93-259, § 6(d)(1), 88 Stat. 61, 29 U.S.C. § 216(b).)

A few other examples demonstrate that Congress does know how to provide at least the foundational language for an

attempt at abrogation of States' immunity. In 1975 Congress amended the Medicaid Act to read:

> "(g) Notwithstanding any other provision of this title, a State plan for medical assistance must include a consent by the State to the exercise of the judicial power of the United States in any suit brought against the State or a State officer by or on behalf of any provider of services . . ., and a waiver by the State of any immunity from such a suit conferred by the 11th Amendment to the Constitution or otherwise." (Pub.L. 94-182, § 111, 89 Stat. 1054, 42 U.S.C. § 1396a(g), repealed, Pub.L. 94-552, § 1, 90 Stat. 2540 (1976).)

Of course, Title VII, the subject of Fitzpatrick v. Bitzer, supra, stands as a successful expression of Congressional abrogation. That Title's language explicitly includes governmental agencies as "persons" for purposes of suit (42 U.S.C. § 2000e(a)), provides for a private civil right of action (42 U.S.C. § 2000e-5(f)(1)) and vests jurisdiction in federal courts (42 U.S.C. § 2000e-5(f)(3)).

A final sample from the Noise Control Act of 1978 (Pub.L. 92-574, 86 Stat. 1234, 42 U.S.C. § 49 et seq.) demonstrates that Congress, even when it may harbor doubts about its power to abrogate sovereign immunity, knows how to launch a trial balloon in the direction of abrogation:

" . . . [A]ny person . . . may

commence a civil action on his own behalf -

"(1) against any person (including (A) the United States and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) . . . ." 42 U.S.C. § 4911(a).

Nothing found in the Rehabilitation Act, however, even approaches the foregoing expressions of Congressional attempts at abrogation. The Act contains no express private right of action, no investiture of jurisdiction in district courts and, perforce, no inclusion of States as defendants in private federal court actions.

Finding the Act entirely lacking on the first part of the appropriate test,

i.e. express abrogation, it becomes unnecessary to proceed to apply the second part, i.e. consent or waiver. Nonetheless, were such an inquiry to be conducted, it is readily apparent that petitioners have not consented to or waived their immunity from suit in federal court.

Other than being alleged recipients of federal financial assistance under the Act,[22] it has not been claimed that petitioners have indicated consent or waiver by any other means or circumstances.

> "The mere fact that a State participates in a program through which the Federal Government provides assistance for the

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22/ See, J.A., pp. 6-7.

operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." (Emphasis added.) Edelman v. Jordan, supra, 415 U.S. at p. 673.

This Court expressed the same view in Florida Dept. of Health v. Fla. Nursing Home Assn., 450 U.S. 147, 150 (1981).

"'. . . [W]e will find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" (Quoting from Edelman, 415 U.S. at p. 673.)

In the case just cited, the Court was

called upon to examine the Medicaid Act (42 U.S.C. § 1396a et seq.), a statutory scheme which contains a vastly greater degree of participation on the part of member States (and attendant federal control thereover) than is found in the Rehabilitation Act. The Court declared, however, that neither participation in and receipt of federal assistance under a government program, nor a concomitant agreement to obey federal law is sufficient to waive the protection of the Eleventh Amendment.[23] Id.

In conclusion, the Rehabilitation Act offers no language, explicit or otherwise, which satisfies the settled

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23/ The Ninth Circuit opinion states that "in this case, there is more than the 'mere fact' of state participation" (Petn., p. A-5), but the decision never identifies what "more" there is.

requisites for abrogation or waiver of sovereign immunity. Failing in that regard, the inquiry should end there. This would be so even if the legislation had been enacted pursuant to section 5 of the Fourteenth Amendment, as contended by respondent. (See discussion under Section C below.) The Court must still find in the statutory scheme the threshold fact of clear Congressional authorization to sue the States. (Fitzpatrick v. Bitzer, supra.[24]

24/ "We concluded that none of the statutes relied upon by plaintiffs in Edelman contained any authorization by Congress to join a State as defendant . . . . (Emphasis added.)

"Our analysis begins where Edelman ended, for in this Title VII case the 'threshold fact of congressional authorization', Id., at 672, to sue the State as employer is clearly present." (427 U.S. at p. 452.)

C. The Rehabilitation Act Represents an Exercise by Congress Under Its Spending Power, Not Under Section 5 of the Fourteenth Amendment

Respondent has sought to avoid application of the standard of express statutory abrogation, which he concedes is the test applied in the Edelman, Quern and Florida Dept. of Health cases, by distinguishing those cases as involving Spending Clause[25] legislation. He then proposes that the Rehabilitation Act was passed pursuant to both the Spending Clause and Section 5 of the Fourteenth Amendment and that under the Fitzpatrick opinion this Court can look beyond the statute itself for

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25/ "The Congress shall have Power To . . . provide for the . . . general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1.

the requisite intent to abrogate. (See Respondent's Brief in Opposition to Petn., pp. 12-13.)

As has been discussed above, however, Fitzpatrick was concerned only with the question of whether Congress possessed the power to abrogate immunity, as opposed to determining where and how the exercise of that power must be expressed. This Court was satisfied that Title VII contained the requisite statutory language of abrogation (427 U.S. at pp. 449, n. 2, 452.)

Additionally, it should be noted that both Edelman and Quern declared and applied their principles in the context of a Fourteenth Amendment enforcement enactment, § 1983 of the Civil Rights Act

of 1871.[26]

Finally, even if one accepts respondent's argument that a broader search is permissible with respect to Fourteenth Amendment legislation, the argument has no application here. The Act is typical Spending Clause legislation.

As this Court recently noted in Consolidated Rail Corp. v. Darrone, supra, 104 S.Ct. at p. 1250:

> "The language of the section (504) is virtually identical to that of § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, that similarly

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26/ "There is no question but that § 1983 was enacted by Congress under § 5 of the Fourteenth Amendment." (Quern v. Jordan, supra, 440 U.S. at p. 351, n. 3 (concurring opinion of J. Brennan, joined in by J. Marshall).)

bars discrimination (on the ground of race, color, or national origin) in federally-assisted programs."

Title VI, in turn, has been unequivocally declared by the Court to be "Spending Clause legislation," which prohibits discrimination only in federally assisted programs, in the fashion of a "typical 'contractual' spending power provision." Guardians Ass'n. v. Civ. Serv. Com'n. of City of N.Y., supra, 103 S.Ct. at p. 3231.

In addition, there exists no indication, explicit or implicit, in the Act or its history[27] to support the

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27/ As an exception in this regard, respondent has pointed to a statement by Senator Cranston, discussed more fully in section D below, to the effect that Congress may authorize attorney's fees pursuant to § 505(b) under, among other (continued)

assertion that Congress believed it was flexing its Fourteenth Amendment powers here, and this Court has announced that it will not presume that source of power in the absence of such evidence.[28]

D. Reference to the Legislative History of the Rehabilitation Act Does Not Reveal Any Congressional Intent to Abrogate States' Immunity

Respondent has urged below that the Fitzpatrick and Hutto decisions permit Congressional intent to abrogate

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things, § 5 of the 14th Amendment. This comment, of course, in no respect implies that in authorizing fees under § 505(b) Congress was, in fact, exercising its 14th Amendment power, or that § 504, enacted five years earlier, had represented an implementation of that power.

28/ See, Pennhurst I, supra, 451 U.S. at pp. 15-18. Cf., EEOC v. Wyoming, 460 U.S. 226, 243-244, n. 18 (1983).

sovereign immunity to be found in the legislative history of the Act. Petitioners disagree that those decisions require or counsel such a perusal.[29] Moreover, even under a generous reading of those cases they are limited in their application to statutes passed pursuant to the enforcement clause of the Fourteenth Amendment; the Rehabilitation Act is a Spending Clause provision.[30]

Nonetheless, even if the Act were considered an exercise of Congress' Fourteenth Amendment enforcement power, or for any other reason a search beyond the statutory language were deemed

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29/ See, discussion under Section B above.

30/ See, discussion under Section C above.

appropriate, one discovers there a paucity of information relevant to an abrogation of States' immunity. Petitioners, of course, are not the first to make this statement. Two Circuit Courts which have performed a review of the legislative history have reached the same conclusion. The Ninth Circuit opinion at issue states:

> "Nor is this a case in which the legislative history makes it clear that Congress intended to make states liable, regardless of their consent." (Petn., p. A-3.)

Arriving at the same conclusion was the First Circuit in Ciampa v. Massachusetts Rehabilitation Com'n., supra, 718 F.2d at p. 3:

> "The current section 504 and relevant legislative histories .

> . . indicate that Congress did not consider the issue of Eleventh Amendment immunity in enacting or amending section 504. Indeed, Congress never got as far as explicitly providing a private cause of action under section 504. Congress cannot by omission override an important constitutional immunity. We conclude that in enacting section 504, Congress did not abrogate the states' Eleventh Amendment immunity." (Footnote omitted.)

In prior briefs in these proceedings respondent has not been able to muster any legislative references which demonstrate an intent under the Act to subject States to private suit in federal courts. The only offerings

which have been made are limited to comments concerning the propriety of attorney's fees awards under section 505(b) of the Act (29 U.S.C. § 794a(b)). Thus, at pages 9-10 of respondent's brief in opposition to the instant petition, we find an isolated statement by Senator Cranston in 1978 in which he expresses the opinion that attorney's fees under section 505(b) may be collected from State officials or State agencies regardless of whether such agency is a named party. Senator Cranston concludes his remarks by stating:

> "Thus, in accordance with the Supreme Court's decision in Hutto v. Finney . . . the 11th Amendment is no bar to the recovery of attorney's fees under

proposed section 505(b) from State government . . . ."[31]

While respondent has argued that these comments suggest a Congressional understanding that States are somehow proper parties in private federal court suits under section 504, the text indicates just the contrary. By finding it necessary to make his case for allowing fee awards against States, despite the Eleventh Amendment, it seems a necessary inference that the Senator likewise must have accepted the corollary, i.e., that relief beyond fees could not be constitutionally impressed against States. His citation of the Hutto decision (holding attorney's fees awards to be "costs" and, thus,

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31/ 124 Cong.Rec. § 15591 (Sept. 20, 1978).

traditionally not repugnant to sovereign immunity) lends further support to this inference.

The legislative history attending the Act is otherwise silent with respect to any mention or consideration of awards or suits vis-a-vis States.

Congress had the opportunity in 1978 when it added section 505 (29 U.S.C. § 794a) to the Act, and subsequently[32] to provide for an attempted abrogation of sovereign immunity by employing express statutory language to that effect. Or, it might have used an alternative analog for the Act's remedial provisions, such as Title VII, which it did accord to aggrieved federal employees under the

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32/ This past year saw the enactment of the Rehabilitation Amendments of 1984, Pub.L. 98-221, 98 Stat. 17 (Feb. 22, 1984).

Act (29 U.S.C. § 794a(a)(1)). Instead, Congress has chosen to incorporate Title VI remedies and say nothing in the Act or during its development on the subject of States' immunity. Such silence and circumstances are themselves significant indications of a legislative intent that the traditional and constitutional immunity of States were not being overridden in this Act. Quern v. Jordan, supra, 440 U.S, at pp. 341-345.

II

THE RESPONDENT'S SUGGESTION THAT THIS COURT REVERSE LONGSTANDING DECISIONS IS INAPPROPRIATE

In an effort to avoid application of the principles discussed in the preceding Sections, respondent has

suggested[33] that this Court use this occasion to overrule Hans v. Louisiana, supra, at note 2, or, at the least, overrule Edelman v. Jordan, supra.

Petitioners consider it a remarkable suggestion that such significant relief would be requested at this judicial level in a case in which a different pleading decision or strategy at the district court level may well have obviated the present review. Moreover, this Court has had numerous opportunities in the past ninety years to retreat from the holding established by the Hans decision. In fact, its holding was reaffirmed only last term in Pennhurst II, supra, 104 S.Ct. at pp. 906-907.

33/ Respondent's Brief in Opposition, pp. 14-16.

Whether, as discussed in Pennhurst II, the prohibition as to suits against unconsenting States is explained as constitutionally compelled by the Eleventh Amendment, Id., or by traditional sovereign immunity doctrine, Id., 104 S.Ct. at p. 930 (dissenting opinion of J. Stevens), it has been endorsed by a long line of cases. Id., 104 S.Ct. at p. 933. It is a principle of law to which all branches of government, both Federal and State, in their respective functions have deferred.

As the Court itself declared in Hans:

"It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution

in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence." (Emphasis added.) 134 U.S. at p. 21.

The Hans decision has enjoyed nearly a century of precedence. Edelman stands on equally firm ground. This is not the case to challenge their validity; rather, the sole issue presented here is whether sovereign immunity has been abrogated or waived under a specific legislative enactment. Whether States' immunity from suit is defensible on constitutional, traditional sovereign immunity or other grounds, is the subject for a separate briefing and petitioners would request that opportunity should the Court be so

disposed.[34]

At this juncture, suffice it to say that federal courts and state governments alike are entitled to perform their respective functions with the benefit of reasonable illumination from the congressional side. If it is

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34/ It is interesting to note, though, that "writers on the public law," including one (Professor Field) cited by respondent, do not suggest that Hans would or should yield a different result under their respective approaches to sovereign immunity analysis. See, Field, supra, at p. 1266. Accord, Jacobs, The Eleventh Amendment and Sovereign Immunity (Greenwood Press, Inc.; 1972), p. 110.

Similarly, commentators support the retention of an Edelman clear statement rule. Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issued in Controversies about Federalism, 89 Harv. L.Rev. 682, 695 (1978); Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L.Rev. 1413, 1441 (1975); Field, supra, at p. 1280, n. 324.

deemed by Congress that national or other interests require abrogation of the traditional immunity of States, it should clearly express that intent. This is particularly true of legislation under the Spending Clause. If, as a condition on the grant of federal money, Congress intends to impose a forfeiture or waiver of immunity, it must do so unambiguously. See, Pennhurst I, supra, 451 U.S. at p. 17; Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 204, n. 26 (1982).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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